Re Haji Ahmad bin Lazim & Ors; ex p Bank Kerjasama Rakyat (M) Bhd

HIGH COURT (IPOH) — BANKRUPTCY NO 29–350 OF 1998
CLEMENT SKINNER JC
11 FEBRUARY 1999

Bankruptcy *— Notice — Application to set aside — Accord and satisfaction of judgment debt — Whether an accord has been reached between appellants and respondent*

Bankruptcy *— Notice — Application to set aside — Issue of more than one notice during the validity of the other — Whether subsequent notice was bad for duplicity*

Civil Procedure *— Execution — Leave to issue execution more than six years after judgment — Leave not obtained to execute judgment — Whether leave to execute judgment necessary before bankruptcy notice can be issued — Bankruptcy Act 1967 s 3(1)(i) — Rules of the High Court 1980 O 46 r 2(1)*

This is an appeal by the first and second judgment debtors ('the appellants') against the decision of the deputy registrar who dismissed their application to set aside the present bankruptcy notice served on each one them. The appellants submitted that the bankruptcy notice should be set aside on three grounds, namely: (i) it is bad for duplicity as the issuance of the previous bankruptcy notice on them, in respect of the same judgment, was still effective; (ii) there has been an accord and satisfaction in respect of the judgment debt; and (iii) as no leave to execute the judgment, upon which the present bankruptcy notice was founded, had been obtained when the bankruptcy notice was issued, and six years had since elapsed, the bankruptcy notice must be set aside.

Held, allowing the appeal:

(1) The issuance of more than one bankruptcy notice during the validity of the other is not bad for duplicity unless it can be shown that such issuance is an abuse of process or amounts to oppressive conduct. In applying to set aside the present bankruptcy notice, the appellants did not complain that the present bankruptcy notice is being used oppressively against them or that it was issued to embarrass them and neither is there any evidence to suggest this. In the circumstances, the issue of the present bankruptcy notice, whilst the first bankruptcy notice was still effective, does not make it bad for duplicity (see p 484A–B).

(2) In the circumstances, the court cannot accept the appellants' submissions that an accord had been reached between the appellants and the respondent, whether through the letter dated 1 February 1993 or cl 6 of the tenancy agreement, nor did the court find that ss 42 and 46 of the Contracts Act 1950 would come to their aid to relieve them from their liability (see p 487A–D).

(3) If more than six years have elapsed since a judgment is obtained, and leave has not been obtained to execute that judgment, the judgment creditor cannot be described as being in a position to issue execution on that judgment. If execution can be issued only with leave of the court, such leave must be obtained before a bankruptcy notice can be issued thereon. Since the respondent has not been able to show that they were in a position to issue execution on their judgment when they issued the present bankrucpty notice, the notice was therefore irregularly issued (see pp 488I–489I); *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 followed; *Re Lim Ah Hee; ex p Perwira Affin Bank Bhd* [1997] 4 CLJ 462 not followed.

(4) The irregularity in this case has resulted in the present bankruptcy notice being issued and served on the appellants when it should not have been issued in the first place. The sufferance of such an act is a matter of substantial injustice to the appellants which cannot be remedied by any order of court short of an order invalidating the bankruptcy notice by setting it aside. In accordance with r 98 of the Bankruptcy Rules 1969, it was held that no act of bankruptcy has been committed by the appellants under the present bankruptcy notice (see p 490F–H).

[**Bahasa Malaysia summary**

Ini adalah satu rayuan oleh penghutang-penghutang penghakiman pertama dan kedua ('perayu-perayu') terhadap keputusan timbalan pendaftar yang telah menolak permohonan mereka untuk mengetepikan notis kebankrapan, yang telah disampaikan kepada mereka masing-masing. Perayu-perayu telah menegaskan bahawa notis kebankrapan tersebut hendaklah diketepikan atas tiga sebab, iaitu: (i) ia adalah satu kependuan yang tidak sah memandangkan pengeluaran notis kebankrapan yang terdahulu, berkenaan penghakiman yang sama, masih lagi berkuatkuasa; (ii) terdapat satu persetujuan dan penyelesaian terhadap hutang penghakiman itu; dan (iii) memandangkan tiada kebenaran untuk melaksanakan penghakiman, dari mana berpuncanya notis kebankrapan itu, telah diperolehi apabila notis dikeluarkan, dan memandangkan enam tahun telah pun berlalu, notis kebankrapan tersebut hendaklah diketepikan.

Diputuskan, membenarkan rayuan:

(1) Pengeluaran lebih daripada satu notis kebankrapan semasa notis yang terdahulu masih lagi sah bukanlah satu kependuaan yang tidak sah, melainkan ia boleh ditunjukkan bahawa pengeluaran tersebut adalah satu penyalahgunaan proses atau merupakan satu tindakan yang menindas. Di dalam memohon untuk mengetepikan notis kebankrapan itu, perayu-perayu tidak membuat aduan bahawa notis kebankrapan tersebut telah digunakan untuk menindas mereka atau ia telah digunakan untuk memalukan mereka, dan juga tidak terdapat sebarang keterangan

yang mencadangkan sedemikian. Pengeluaran notis kebankrapan itu, semasa notis kebankrapan yang pertama masih lagi berkuatkuasa, tidak menjadikannya kependuaan itu tidak sah (lihat ms 484A–B).

(2) Mahkamah tidak dapat menerima penghujahan-penghujahan perayu-perayu bahawa terdapat satu persetujuan yang telah dicapai di antara perayu-perayu dan penentang, sama ada melalui surat bertarikh 1 Februari 1993 atau fasal 6 perjanjian penyewaaan. Mahkamah juga tidak mendapati bahawa ss 42 dan 46 Akta Kontrak 1950 akan memberi pertolongan kepada mereka untuk melepaskan mereka daripada tanggungan mereka (lihat ms 487A–D).

(3) Jika lebih daripada enam tahun telah berlalu sejak penghakiman telah didapati, dan kebenaran untuk melaksanakan penghakiman tidak didapati, pemiutang penghakiman tidak boleh dikatakan sebagai berada di dalam keadaan untuk menjalankan perlaksanaan atas penghakiman tersebut. Jika perlaksanaan boleh dijalankan hanya dengan kebenaran mahkamah, kebenaran mestilah diperolehi terlebih dahulu sebelum satu notis kebankrapan boleh dikeluarkan. Memandangkan penentang tidak dapat menunjukkan bahawa mereka berada di dalam keadaan untuk menjalankan perlaksanaan atas penghakiman mereka semasa mengeluarkan notis kebankrapan tersebut, notis tersebut adalah, dengan itu, di luar aturan (lihat ms 488I–489I); *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 diikut; *Re Lim Ah Hee; ex p Perwira Affin Bank Bhd* [1997] 4 CLJ 462 tidak diikut.

(4) Luar aturan di dalam kes ini telah menyebabkan notis kebankrapan itu dikeluarkan dan disampaikan kepada perayu-perayu sedangkan ia tidak patut dikeluarkan pada mulanya. Penanggungan tindakan sedemikian adalah satu ketidakadilan besar kepada perayu-perayu yang tidak boleh diremedikan oleh apa-apaperintah mahkamah melainkan satu perintah yang menjadikan notis kebankrapan itu tak sah dengan mengetepikannya. Selaras dengan k 98 Kaedah-Kaedah Kebankrapan 1969, mahkamah telah mengisytiharkan bahawa tiada perbuatan kebankrapan telah dilakukan oleh perayu-perayu di bawah notis kebankrapan itu (lihat ms 490F–H).]

Notes

For cases on application to set aside bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1708–1724.

For cases on leave to issue execution more than six years after judgment, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1807–1808.

Cases referred to

A Bankruptcy Notice, Re [1898] 1 QB 383 (refd)
Chinn Swee Onn v Puchong Realty Sdn Bhd [1990] 1 MLJ 108 (refd)
Datuk Mohd Sari bin Datuk Hj Nuar v Norwich Winterthur Insurance (M) Sdn Bhd [1992] 2 MLJ 344 (refd)
Fredericke and Whitworth, Re; ex p Hibbard [1927] 1 Ch 253 (refd)
Haji Nik Ishak bin Haji Nik Daud v Nik Zainab bte Nik Jaafar [1975] 2 MLJ 82 (refd)
Ide, Re; ex p Ide (1886) 17 QBD 755 (refd)
Kerpa Singh v Bariam Singh [1966] 1 MLJ 38 (refd)
Lim Ah Hee, Re; ex p Perwira Affin Bank Bhd [1997] 4 CLJ 462 (not folld)
Mohamad Fadzimi Yaakub, Re; ex p United Malayan Banking Corp Bhd [1998] 1 CLJ 783 (refd)
Woodall, Re; ex p Woodall (1884) 13 QBD 479 (refd)
Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 131
Bankruptcy Act 1883 s 4(1)(g) [UK]
Bankruptcy Rules 1969 rr 96, 98
Contracts Act 1950 ss 42, 64
Rules of the High Court 1980 O 46 r 2(1)
Rules of the Supreme Court 1883 O XLII rr 10, 23 [UK]

Lee Pui Man (*Khong & Son*) for the judgment debtors.
A Mariadass (*Mariadass Lock & Ainuddin*) and *Shivdev Singh* (*LH Singh* with him) (*LH Singh & Co*) for the judgment creditor.

Clement Skinner JC: This appeal is brought by the first and second judgment debtors ('the first and second appellants') against the decision of the deputy registrar who, on 2 October 1998, dismissed their application to set aside a bankruptcy notice, dated 5 May 1998 ('the present bankruptcy notice'), served on the first appellant on 8 June 1998, and on the second appellant on 12 June 1998.

The facts leading up to this appeal are these.

The first and second appellants are proprietors of a firm trading as Syarikat Alfa. On 8 July 1987, the judgment creditor ('the respondent') obtained judgment in Suit No 23–508–86 against the first and second appellants, trading as Syarikat Alfa, in the sum of RM2,005,361.28, together with interest thereon at 16% pa from 31 October 1986 till date of judgment, and thereafter at 8% pa till date of payment.

In 1987, when judgment was entered, the second appellant was the registered owner of the premise known as No 45, Kompleks PKNP Medan Gopeng, Ipoh ('the premise'). The respondent was occupying the ground floor of the premise as tenant. From 1 February 1993, an arrangement was entered into ('the rental arrangement') whereby the respondent, instead of

paying the rental of RM1,500 to the second appellant, paid the amount into an account, in the name of Syarikat Alfa, maintained with the respondent so that the rental could be utilized to pay the debt of Syarikat Alfa. A

In 1997, the second appellant sold the premise to a company known as Maju Alfa (M) Sdn Bhd ('Maju Alfa') where on 3 June 1997, a tenancy agreement was entered into between the respondent and Maju Alfa, wherein the rental arrangement was preserved. The monthly rental payable for the premise was RM2,200. By cl 6(i) of the tenancy agreement, Maju Alfa permitted the respondent to deduct from the rental, a sum of RM1,800, which was to be treated as payment by Syarikat Alfa to the respondent. This arrangement was to go on until the debt of Syarikat Alfa was settled or until further notice from Maju Alfa. B C

The above arrangement went on till April 1998, when the respondent refused to deduct the sum of RM1,800 from the rental towards the settlement of Syarikat Alfa's debt, and instead paid the whole rental of RM2,200 direct to Maju Alfa. The respondent ceased deducting the sum of RM1,800 from the rental because on 5 May 1998, they had issued the bankruptcy notice now complained of. D

To complete the picture, certain other background facts must be alluded to. On 22 December 1997, the respondent had issued, and thereafter, served on the first and second appellants Bankruptcy Notice No 29–913–97 ('the first bankruptcy notice'), founded on the judgment dated 8 July 1987. The first bankruptcy notice was served on different dates on each of the appellants. I am unable to ascertain, from the documents, the date of service but on 14 February 1998, the first appellant filed an application to set the same aside. The second appellant, on 21 February 1998, filed her application to do the same. The respondent then, on 5 May 1998, issued the present bankruptcy notice and served the same on the first appellant on 8 June 1998, and on the second appellant, on 12 June 1998. On being so served, the first and second appellants, on 15 June 1998, applied to set the same aside. On 9 July 1998, the application to set aside the first bankruptcy notice was heard. It was set aside with costs with no objection thereto from the respondent. The appellants' application to set aside the present bankruptcy notice came up for hearing on 2 October 1998, where it was disallowed, hence this appeal. E F G

The appellants say that the present bankruptcy notice should be set aside based on several grounds: (i) it is bad for duplicity; and (ii) there has been an accord and satisfaction in respect of the judgment debt. For the record, the appellants abandoned another complaint regarding non-payment of their costs. H

During the arguments, it was apparent to me that the judgment, upon which the present bankruptcy notice was founded, had been obtained more than six years ago. In reply to a question from me, counsel for the respondent stated that when the present bankruptcy notice was issued and served, leave to execute the judgment had not been obtained even though leave had apparently been obtained previously, but had since lapsed, as more than a year had passed since leave was obtained. I therefore invited arguments from counsel, on whether a bankruptcy notice could be issued I

based on a judgment where more than six years had elapsed since the date of that judgment, and no leave to execute the same had been obtained. The appellants have accordingly, raised as a third ground, the objection that as no leave to execute the judgment had been obtained when the present bankruptcy notice was issued, it must be set aside.

I shall now deal with each of these grounds.

Duplicity of bankruptcy notice

It is the submission of the appellants that the issuance of more than one bankruptcy notice in respect of the same judgment debt renders the second bad for duplicity. As the first bankruptcy notice had not been set aside yet when the present bankruptcy notice was issued on 5 May 1998, the issuance of the first bankruptcy notice precludes the issuance of a subsequent bankruptcy notice when the first was still effective.

I have looked at the provisions of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 to see if anything may be found in them to lend support for the appellants' complaint, but cannot find any. A bankruptcy notice must be served within three months from the date of issue thereof (see r 96 Bankruptcy Rules 1969). If not so served within that time frame, a second bankruptcy notice may be issued on the same judgment. If that be the case, will a second bankruptcy notice, issued whilst the first notice is still valid or effective, render the second notice bad for duplicity? There is case law to the effect that it would not, unless it can be shown that the issuance of more than one notice during the validity of the other is an abuse of process or amounts to an oppressive conduct. Learned counsel for the respondent has referred to the case of *Re Fredericke and Whitworth; ex p Hibbard* [1927] 1 Ch 253. In that case, the judgment creditor issued three bankruptcy notices against the judgment debtors, founded on the same judgment debt. The first bankruptcy notice was ordered to be withdrawn due to an informality. A second bankruptcy notice was issued and served on the judgment debtors. It was not complied with and so an act of bankruptcy became available. Whilst this act of bankruptcy was still available to found a bankruptcy petition, the judgment creditor issued a third bankruptcy notice against the judgment debtors, which was not complied with. A bankruptcy petition was then presented based on the act of bankruptcy available on the third notice. The judgment debtors applied to set aside a receiving order made against them on the grounds that they were excused from complying with the third bankruptcy notice by, virtue of the service of the second bankruptcy notice on them. The registrar refused to set aside the order. On appeal, the Court of Appeal dismissed the same and in doing so, Sargant LJ said (at pp 261–262):

> If, while an earlier bankruptcy notice were still available for a petition, a second notice were given in bad faith or to embarrass the debtor, the court could prevent oppression by declining to act. But in my view, there has been nothing of this sort here. The first bankruptcy notice had been withdrawn, objections had been taken to the second notice which had not been conclusively satisfied, and I think that the third notice was served to escape

from those objections, and to place the petitioning creditors in a stronger and less challengable position than they had previously occupied. A

In applying to set aside the present bankruptcy notice, the appellants do not complain that the present bankruptcy notice is being used oppressively against them or that it was issued to embarrass them, and neither is there any evidence to suggest this. In fact, the respondent has not acted any further on the first bankruptcy notice and agreed to it being set aside on 9 July 1998. In the circumstances, I hold that the issue of the present bankruptcy notice, whilst the first bankruptcy notice was still effective, does not make it bad for duplicity. B

Accordance and satisfaction C

Simply put, it is the appellants' case that an accord had been reached with the respondent that the judgment debt of RM2.5m was to be paid by instalments until fully settled. The appellants say that, initially, the instalments were to be paid by Hajah Faridah, the second appellant, and subsequently by Maju Alfa. The respondent deny any such an accord. D

The question for determination is whether there was such an accord as alleged. The appellants say that the accord is initially to be inferred from a letter, dated 1 February 1993, from Syarikat Alfa to the respondent together with the conduct of the respondent in accepting the instalments without reservation, and thereafter, withholding execution on the judgment for three or four years. Subsequently, when Maju Alfa became the owner of the premise, the accord is evidenced by cl 6(i) of the said tenancy agreement and the unequivocal acceptance of the instalments from Maju Alfa for the credit of Syarikat Alfa. The letter, dated 1 February 1993, sets out the rental arrangement in these terms: E

Rujukan kami: SA/BR–4011/93 Tarikh: 1 Februari 1993 F

Bank Rakyat
No 45, Kompleks PKNP
Medan Gopeng Satu
Jalan Gopeng
31350 Ipoh. G

U/p: En Ahmad Kidzbullah Hj Ridzuan
Pengurus

Tuan,

Bayaran sewa pejabat di No 45, Kompleks PKNP Medan Gopeng 1, Jalan Gopeng, 31350 Ipoh sebanyak RM1,500 H

Adalah dengan hormatnya berhubung perkara di atas.

Kami telah pun membuat satu persetujuan khas dengan pihak Bank Rakyat pusat di Kuala Lumpur bagi pihak tuan membuat pembayaran terus sewa pejabat dari Syarikat Alfa berjumlah RM1,500, kepada Bank Rakyat pusat yang beralamat di Suite 3.4, Tingkat 3, Bangunan Angkasa Raya, Jalan Ampang, Kuala Lumpur, untuk perhatian En Ramman bin Masdr bermula dari bulan Mac 1993. I

Tuan boleh meneruskan pembayaran ini sehingga mendapat arahan daripada kami samada untuk memberhentikannya ataupun meneruskannya.

A Pembayaran ini adalah dikira dari sewa bulan Mac 1993.

Sekian. Kerjasama pihak tuan amatlah dihargai dan terlebih dahulu diucapkan ribuan terima kasih.

Yang benar,

B Syarikat Alfa
tt

Haji Ahmad bin Lazim
Pengurus

It should be noted that this letter does not refer to the judgment debt or to C the judgment obtained against the appellants as proprietors of Syarikat Alfa. The letter also did not, in any way, state that the appellants were offering to pay the whole judgment debt by monthly instalments of RM1,500 until fully settled and that the rental were to be treated as payment of those monthly instalments.

D That being the case, I do not see on what basis it is submitted by the appellants that it is to be inferred from the letter, dated 1 February 1993, that an 'accord' had been reached between the appellants and respondent that the whole judgment debt was to be paid by monthly instalments. In fact, there is a condition stated in the said letter that militates against the inference suggested by the appellants. The appellants had, in that letter, E expressly reserved to themselves the right to terminate the rental arrangement. With such a condition, the more reasonable inference is that the rental arrangement was a temporary measure which was not to bind the appellants to the arrangement made. In the circumstances, I cannot accept the appellants' submission that an accord had been reached in 1993.

F It was then said that after the second appellant transferred the premise to Maju Alfa, the 'accord' is evidenced in cl 6(i) of the tenancy agreement which reads:

> Pemilik bangunan memberi kebenaran kepada penyewa untuk membuat potongan wang berjumlah Ringgit Malaysia Satu Ribu Lapan Ratus (RM1,800) sahaja daripada sebahagian bayaran sewa berkenaan pada tiap-
> G tiap bulan bagi tujuan menjelaskan hutang Syarikat Alfa (BR No 354879) kepada penyewa mengikut akaun No Ruj 9030/1269/88/tp–5 yang disimpan di antara Syarikat Alfa dan penyewa sehingga selesai hutang berkenaan ataupun sehingga menerima arahan selanjutnya secara rasmi daripada pemilik bangunan untuk memberhentikan potongan bayaran sewa berkenaan sepertimana yang telah dipersetujui oleh kedua-dua pihak menurut surat
> H arahan daripada pemilik bangunan kepada penyewa bertarikh 1 Februari 1993 yang dilampirkan bersama ini sebagai 'lampiran A'. Walau bagaimanapun, wang lebihan bayaran sewa tersebut, setelah dibuat potongan tersebut, akan dijelaskan oleh penyewa terus kepada pemilik bangunan pada setiap bulan atau pun pada arahan lain yang diberikan dan dipersetujui kemudian di antara kedua-dua pihak.

I There are several things to note about cl 6(i). Firstly, the appellants are not a party to the tenancy agreement and the clause makes no mention of the judgment debt. I do not, therefore, see on what basis the appellants say that cl 6(i) constitutes an agreement between the appellants and the respondent to pay the whole judgment debt by monthly instalments. Secondly, the

words 'sehingga selesai hutang berkenaan atau pun sehingga menerima arahan selanjutnya secara rasmi daripada pemilik bangunan' indicates that the permission to set-off or deduct rental may be revoked at any time by Maju Alfa. If that be the case, there is no certainty that the rental arrangement, as evidenced in cl 6(i), will continue until the whole judgment debt is fully settled. Thirdly, the tenancy agreement itself is for a period of three years with a right of extension for two further periods of three years each. Thus, even if all the extensions were granted, the tenancy agreement will last a maximum of nine years only. The judgment debt would, therefore, never be fully paid within the tenancy period. This fact weighs against any inference that there was an accord to settle the whole judgment debt by monthly instalments of RM1,800. Fourthly, the tenancy agreement contains other clauses, such as cll 6(h) and 7(e), whereby the tenancy agreement could be terminated earlier by a six months notice. Such terms in the tenancy agreement again go against any inference that there was an accord that the whole judgment debt was to be fully settled by instalments by way of the rental. For the reasons stated above, I find cl 6(i) of the tenancy agreement did not evidence an accord as alleged.

It is next said by the appellants, in the alternative, that at the time of the issue of the present bankruptcy notice, there was in existence a collateral agreement between Maju Alfa and the respondent. This collateral agreement is to be found in cl 6(i) of the tenancy agreement and counsel for the appellants refers to the case of *Datuk Mohd Sari bin Datuk Hj Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 344, where the notes read:

> The terms of the consent judgment were controlled by an outside agreement between the judgment debtor and creditor through their solicitors, and non-compliance with the judgment is not an act of bankruptcy so long as the terms of the judgment are controlled by that outside agreement.

Learned counsel for the appellants did not elaborate what the collateral agreement to be found in cl 6(i) is, but by reference to *Datuk Mohd Sari*'s case, I take it that counsel submits that cl 6(i) of the tenancy agreement constitutes an outside agreement entered into between Maju Alfa and the respondent to the effect that Maju Alfa would settle the whole judgment debt by instalments, and that since that collateral agreement now controls the judgment entered against the appellants, the respondent cannot now demand that the appellants pay the judgment debt as required by the bankruptcy notice.

I am afraid that I do not find merit in this submission. Clause 6(i) makes no mention at all about the judgment entered against the appellants and that the deductions from the rental are to satisfy that judgment. More importantly, I cannot find any words in the clause to suggest that an agreement had been reached between Maju Alfa and the respondent that Maju Alfa would be responsible to settle the whole judgment debt in place of the appellants.

It was finally argued by the appellants that on the facts of this case, ss 42 and 64 of the Contracts Act 1950 would come to their aid to relieve them of their liability.

A It was said that s 42 applied as the respondent had accepted performance of the obligation to pay the whole judgment debt by Maju Alfa. I regret that I do not accept this submission. I have, earlier in this judgment, discussed cl 6(i) of the tenancy agreement in the context of both an 'accord' as well as a collateral agreement. It follows from what I have already said on each of those submissions that I now hold that the respondent had not B accepted performance by Maju Alfa nor had Maju Alfa agreed to so pay the whole judgment debt.

The appellants have referred to the cases of *Kerpa Singh v Bariam Singh* [1966] 1 MLJ 38; *Haji Nik Ishak bin Haji Nik Daud v Nik Zainab bte Nik Jaafar* [1975] 2 MLJ 82 and *Chinn Swee Onn v Puchong Realty Sdn Bhd* C [1990] 1 MLJ 108, in support of their arguments under s 42 of the Contracts Act 1950. I find that these authorities do not advance the case for the appellants as, firstly, their facts are not on all fours with the facts of our case and, secondly, in each of the cited cases, the court found that either the judgment creditor had agreed to accept performance from a third party or that the judgment creditor had agreed to discharge the original judgment D debtor from further liability. I have not found any of these elements in our case.

As regards to s 64, it is said that by accepting instalment payments, the respondent had agreed to 'extend the time for performance' to pay the judgment debt. I must again say that I cannot accept this argument. I have E already, in discussing the rental arrangement in 1993 and later in 1997, found that there was no agreement whether between the appellants or Maju Alfa and the respondent, for payment of the whole judgment debt by instalments.

Was leave to execute the judgment necessary?

F

The respondent say that the appellants should be estopped from taking this objection as it was not raised in their affidavit. I wish to point out that it was the court that invited submissions on this point. In doing so, no procedural unfairness has resulted to the respondent as they were given time to research and submit on the matter. I therefore hold that the appellants are not G prevented from taking this point.

Section 3(1)(i) of the Bankruptcy Act 1967, omitting immaterial portions, read as follows:

> A debtor commits an act of bankruptcy ...
>
> (i) if a creditor has obtained a final judgment against him for an amount and H execution thereon not having been stayed has served on him ... a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or notice ... and he does not within seven days after service of the notice ... comply with the requirements of the notice ...
>
> I Provided that for the purposes of this paragraph ... any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

Order 46 r 2(1) Rules of the High Court ('the RHC') reads:

> A writ of execution to enforce a judgment or order may not issue without the leave of Court in the following cases, that is to say —
>
> (a) Where six years or more have lapsed since the date of judgment or orders; ... .

The objection taken in this appeal was also raised in the case of *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508. In that case, Edgar Joseph Jr J (as his Lordship then was), undertook a proper interpretation of s 3(1)(i) of the Bankruptcy Act 1967, and in doing so, examined the position in the United Kingdom where, as pointed out by his Lordship, the provisions of s 4(1)(g) of the Bankruptcy Act 1883, is generally in pari materia with s 3(1)(i) of our Bankruptcy Act. Having considered the cases of *Re Ide; ex p Ide* (1886) 17 QBD 755 and *Re Woodall; ex p Woodall* (1884) 13 QBD 479, both of which cases he found to be of direct relevance when construing s 3(1)(i) of our Bankruptcy Act, and therefore to follow, his Lordship stated at p 510:

> To my mind, it is not an unfair summary of the position in UK to say that a creditor can issue a bankruptcy notice only when he has obtained a final judgment or a final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

Learned counsel for the respondent urges me not to follow the decision in *Wee Chow Yong*. Counsel submits that as bankruptcy proceedings do not constitute execution proceedings within the meaning of O 46 of the RHC, the failure to obtain leave to execute the judgment in this case cannot amount to an impediment which comes within the meaning of the words 'and has not been stayed' found in s 3(1)(i) of our Bankruptcy Act. The cases of *Re Lim Ah Hee; ex p Perwira Affin Bank Bhd* [1997] 4 CLJ 462 and *Re A Bankruptcy Notice* [1898] 1 QBD 383, are relied upon in support of the above submission. Counsel further submits that what Edgar Joseph Jr J said in *Wee Chow Yong*, regarding the requirement of a judgment creditor to show that he is in a position to enforce his judgment, is to be regarded as 'obiter' only since the learned judge finally decided that no leave was in fact required in that case. Finally, counsel submitted that the learned judge was referring to the practice in the UK where, though bankruptcy proceedings are not regarded as a form of execution, yet as a matter of practice, a master's flat is still required before a bankruptcy notice is issued. Since there is no such practice requirement in Malaysia, and as authorities show that O 46 of the RHC has no relevance to bankruptcy proceedings, there is no requirement for the respondent to obtain leave to execute their judgment before issuing the present bankruptcy proceedings.

I regret that I cannot accept these submissions. That the issue of a bankruptcy notice is not execution to enforce a judgment is not in dispute. This was made very clear in *Wee Chow Yong*, where the learned judge went out of his way to point this out when he said at p 510: 'I would make the

A preliminary observation that the issue of a bankruptcy notice is not execution to enforce a judgment (see eg *Re A Bankruptcy Notice*, per Chitty LJ at p 386).' However, the decision in *Wee Chow Yong* makes it clear that if more than six years have elapsed since a judgment is obtained, and leave has not been obtained to execute that judgment, the judgment creditor cannot be described as being in a position to issue execution on that B judgment. If execution can be issued only with leave of the court, such leave must be obtained before a bankruptcy notice can be issued thereon.

I should point out that the reason such leave is required is because of the words 'and execution thereon not having been stayed'. These words, which appear in s 4(1)(g) of the UK Bankruptcy Act 1883, and also in C s 3(1)(i) of our Bankruptcy Act 1967, have been interpreted in the case of *Re Woodall* (per Lindley LJ) and in *Re Ide* (per Bowen LJ) to mean that a judgment creditor must not merely have obtained a final judgment but must be in a position to issue execution upon it.

With reference to the case of *Re Lim Ah Hee*, I note that although it was D a decision delivered in 1997, the case of *Wee Chow Yong* was not referred to or considered. It should also be noted that the specific question of whether the judgment creditor needed to obtain leave to execute the judgment before issuing a bankruptcy notice was withdrawn from consideration as the judgment debtor was satisfied that leave had been obtained. In the circumstances, I respectfully decline to follow it.

E I do not regard what the learned judge said in the *Wee Chow Yong* case regarding the requirement for leave to issue execution on a judgment as mere 'obiter dicta' as alleged. The reverse is the position. Notwithstanding that the learned judge found, on the evidence before him that as six years had not elapsed between the judgment date and the date the bankruptcy F notice was served, that no leave to execute the judgment was necessary, this does not render at all what he said, regarding the requirement for such leave, as 'obiter', because to arrive at such decision, he had to first decide whether or not leave was required. What the learned judge said was therefore part of the reasons for his decision.

As regards to the submission that leave under O 46 r 2(1) of the RHC G is not required because such leave in UK refers to a master's flat which is a thing unknown and not required in Malaysia, I cannot agree with this argument. Whilst as a matter of practice in UK, a master's flat is required, a reading of the case of *Re Ide* and *Re Woodhall* will show that the learned appeal judges were referring to the leave expressly required under rr 10 and H 23 of Order XLII, respectively, of the English Rules of the Supreme Court 1883, to enforce a judgment in the situations therein stated. In Malaysia, the leave provisions are found in our O 46. The fact that we do not require a master's flat to issue a bankruptcy notice does not mean that a judgment creditor need not comply with a substantive provision of the Bankruptcy Act, namely, s 3(1)(i), to show that he is in a position to issue execution on I his judgment when the bankruptcy notice is issued.

It is therefore my respectful view that the case of *Wee Chow Yong* correctly states the law on this point and have no hesitation in following it.

Reverting to this appeal, the respondent have not been able to show that they were in a position to issue execution on their judgment when they issued the present bankruptcy notice. It was therefore issued irregularly. Learned counsel for the respondent submits that a bankruptcy notice issued in such circumstances is not void but voidable and that I should not set aside the present bankruptcy notice as was the course taken in the case of *Re Mohamad Fadzimi Yaakub; ex p United Malayan Banking Corp Bhd* [1998] 1 CLJ 783.

A reading of *Re Fadzimi* shows that Selventhiranathan J, decided that failure to obtain leave to execute a judgment rendered the bankruptcy notice founded thereon voidable only, and not void. The learned judge decided against setting aside the bankruptcy notice because he found, on the facts of that case, an unmeritorious conduct on the judgment debtor's part in waiting for some two years before coming to court, by which time limitation on the judgment had almost set in, thus preventing the judgment creditor from proceeding afresh. I cannot find similar conduct on the part of the appellants here. They have challenged the present bankruptcy notice upon being served with it. And they had also challenged the first bankruptcy notice which was set aside.

Section 131 of the Bankruptcy Act 1967 reads:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

The irregularity in this case has resulted in the present bankruptcy notice being issued and served on the appellants when it should not have been issued in the first place. The legal consequence of such service on the appellants is that if they do not, within seven days, respond in the manner indicated in the bankruptcy notice, they will have committed an act of bankruptcy. That act of bankruptcy becomes available not only to the respondent but to any other creditor of the appellants to present a bankruptcy petition on. I consider the sufferance of such an act as a matter of substantial injustice to the appellants which cannot be remedied by any order of court short of an order invalidating the bankruptcy notice by setting it aside, which I now do. In accordance with r 98 of the Bankruptcy Rules 1969, I also declare that no act of bankruptcy has been committed by the appellants under the present bankruptcy notice. This appeal is accordingly allowed with costs. The decision of deputy registrar is set aside.

Appeal allowed.

Reported by Tan Cheng Siong